Supreme Court, U.S.
FILED
FEB 28 1997
CLERK

No. 96-1181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,
v.
CITY OF PHILADELPHIA, and
CONSOLIDATED RAIL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

CONSOLIDATED RAIL CORPORATION'S BRIEF IN OPPOSITION

BENJAMIN C. DUNLAP, JR.
DAVID C. EATON
Counsel of Record
NAUMAN, SMITH, SHISSLER & HALL
200 North Third Street
P.O. Box 840
Harrisburg, PA 17108
(717) 236-3010

JOHN F. FANSMITH
Associate General Counsel
Taxes and Securities
SCOTT K. WASSERKRUG
Associate General Counsel
CONSOLIDATED RAIL CORPORATION
Two Commerce Square
2001 Market Street
Floor 16-A
Philadelphia, PA 19101
Counsel for Respondent Consolidated Rail Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Preliminarily, the Court must address the following question:

1. Whether the decision of the Pennsylvania Supreme Court sought to be reviewed is interlocutory in nature and thus not ripe for review at this time?

Should the Court conclude that review at this time is appropriate, the question is substantially as set forth by Petitioner:

2. Whether a *potential* allocation of costs by the Pennsylvania Public Utility Commission to National Railroad Passenger Corporation for repair, alteration, rehabilitation or maintenance of a bridge carrying a City of Philadelphia street above the right of way of the National Railroad Passenger Corporation constitutes a "tax or fee" within the meaning of 49 U.S.C. § 24301(*l*)?

LIST OF PARTIES

The parties before this Court are the Pennsylvania Public Utility Commission, named as Petitioner; the City of Philadelphia, named as a Respondent; Consolidated Rail Corporation, named as a Respondent; and the Pennsylvania Department of Transportation, which intervened in the proceeding in the court below, whose judgment is sought to be reviewed. Neither the National Railroad Passenger Corporation nor the Southeastern Pennsylvania Transportation Authority are parties before this Court. The National Railroad Passenger Corporation did not intervene in the proceeding below, whose judgment is sought to be reviewed, pursuant to the requirements of Pennsylvania Rule of Appellate Procedure 1531, reprinted in the Appendix hereto. (App. A at 1a). Although the Southeastern Pennsylvania Transportation Authority did formally intervene in the proceeding below, whose judgment is sought to be reviewed, it thereafter failed to participate by filing a brief or taking part in oral argument.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
JURISDICTION	1
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
I. THE CASE IS NOT RIPE FOR REVIEW, IN THAT THE DECISION BELOW IS MERELY INTERLOCUTORY, NO CONFLICT EXISTS BETWEEN THE PARTIES PRESENTLY BEFORE THE COURT, AND THE ASSERTED CONSEQUENCES OF NOT GRANTING CERTIORARI ARE SPECULATIVE AND OVERSTATED	3
A. The Issue Raised By The PUC Is Not Ripe For Determination, In That The Matter Was Remanded For Further Proceedings And The Asserted Consequences Are Merely Hypothetical	3
B. No Conflict Exists Between The Parties, In That The Petition Asks The Court To Determine The Proper Characterization Of Rail-Highway Crossing Cost Allocations Against Amtrak And SEPTA Where Those Entities Are Not Parties Before This Court	6
II. THE DECISIONS OF THE THIRD AND SECOND CIRCUITS WHICH RELATE TO AMTRAK'S EXEMPTION ARE BASED ON DIFFERENT SUBJECT MATTER AND PRESENT NO CONFLICT	9

TABLE OF CONTENTS—Continued

Page

III. THE CHARACTERIZATION OF PUC ASSESSMENTS AS TAXES UNDER A DIFFERENT STATUTE IN A SEPARATE CASE, WHICH IS AWAITING REVIEW BY THE THIRD CIRCUIT, IS NOT PROPERLY BEFORE THIS COURT AND THUS IS NOT RIPE FOR CONSIDERATION 10

IV. THE GRANTING OF CERTIORARI WOULD NOT BE A PROPER EXERCISE OF THE COURT'S DISCRETION, IN THAT THIS CASE PRESENTS A PURELY LOCAL ISSUE WITH NO NATIONAL RAMIFICATIONS..... 12

CONCLUSION 13

APPENDIX A 1a

TABLE OF AUTHORITIES

Cases:

	Page
Aaron v. Cooper, 357 U.S. 566 (1958)	11
Asarco Inc. v. Kadish, 490 U.S. 605 (1989)	7, 8
Baker v. Carr, 369 U.S. 186 (1962)	7
Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327 (1967)	4
Burke v. Barnes, 479 U.S. 361 (1987)	12
City of Philadelpia v. Pennsylvania Public Utility Commission, 676 A.2d 1298 (Pa. Comwlth. 1996)	1, 3, 7
Diamond v. Charles, 476 U.S. 54 (1986)	7
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	13
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	4
National Railroad Passenger Corp. v. City of New York, 882 F.2d 710 (2d Cir. 1989)	9, 10
National Railroad Passenger Corp. v. Commonwealth of Pennsylvania and Township of Tredyffrin, 1991 U.S. Dist. LEXIS 92 (E.D. Pa. No. 86-5357, filed January 2, 1991)	6
National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3d Cir. 1988), *cert. denied*, 488 U.S. 893 (1988)	5, 6, 9, 10
Renne v. Geary, 501 U.S. 312 (1991)	9
Sierra Club v. Morton, 405 U.S. 727 (1972)	7
United States v. SCRAP, 412 U.S. 669 (1973)	7
United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 508 U.S. 946 (1993)	3, 4
Virginia Military Institute v. United States, 508 U.S. 946 (1993)	3, 4
Wheeling & Lake Erie Railway Co. v. Pa. Public Utility Commission, et al., Civil Action No. 94-1776 (W.D. Pa. 1996)	11
Whitmore v. Arkansas, 495 U.S. 149 (1990)	5

TABLE OF AUTHORITIES—Continued

Constitution, Statutes and Rules: Page

Federal:

49 U.S.C. § 11501 ..... 11, 12
49 U.S.C. § 24301(*l*) ..... i, 2, 6, 10, 11, 12
49 U.S.C. § 24501(g) 7
Article III to the United States Constitution 5, 7
14th Amendment to the United States Constitution.. 4
Supreme Court Rule 10 3
Supreme Court Rule 12.6 7

State:

Pennsylvania Rule of Appellate Procedure 1531 .... ii, 2, 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1181

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner,

v.

CITY OF PHILADELPHIA, and
CONSOLIDATED RAIL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

CONSOLIDATED RAIL CORPORATION'S BRIEF IN OPPOSITION

The Respondent, Consolidated Rail Corporation ("Conrail"), respectfully requests that this Court deny the Petition for a Writ of Certiorari, which seeks review of the Pennsylvania Commonwealth Court's opinion in this case, as to which the Pennsylvania Supreme Court denied the petition of the Pennsylvania Public Utility Commission ("PUC") for allowance of appeal. The opinion of the Commonwealth Court is reported at 676 A.2d 1298 (Pet. App. at 3a) and the order of the Pennsylvania Supreme Court is reprinted in the Appendix attached to the PUC's Petition for a Writ of Certiorari. (Pet. App. at 1a).

JURISDICTION

Although Conrail does not dispute the asserted basis for invoking this Court's jurisdiction, it does contend that

the case is not sufficiently ripe for disposition, as outlined in Section I of Conrail's Reasons for Denying the Petition.

STATUTES INVOLVED

In addition to those statutes cited by Petitioner as being involved (Pet. at 2), Pennsylvania Rule of Appellate Procedure 1531 is reprinted at Appendix A, page 1a, attached hereto.

COUNTERSTATEMENT OF THE CASE

The factual and procedural background of this case is adequately stated in the Petition. Conrail, however, disagrees with Petitioner's speculative contention that the decision of the court below, whose judgment is sought to be reviewed, prevents Petitioner from fulfilling its statutory duty to protect the public safety at rail-highway crossings. Conrail also disagrees with Petitioner's contention that the conflict between the decisions of the Third Circuit and the Pennsylvania state courts on the application of a statutory exemption under 49 U.S.C. § 24301(*l*) to National Railroad Passenger Corporation ("Amtrak") either warrants or is ripe for review at this time, absent further proceedings by the PUC on remand or in the absence of Amtrak or the Southeastern Pennsylvania Transportation Authority ("SEPTA") as parties before this Court.

Moreover, no conflict exists between the decisions of the Third and Second Circuits regarding the extent of Amtrak's exemption, as indicated by the PUC, as those decisions are based on different subject matter and clearly distinguishable. Nor does this case present more than a local issue, affecting only rail-highway crossings in Pennsylvania, which has no national ramifications.

REASONS FOR DENYING THE PETITION

I. THE CASE IS NOT RIPE FOR REVIEW, IN THAT THE DECISION BELOW IS MERELY INTERLOCUTORY, NO CONFLICT EXISTS BETWEEN THE PARTIES PRESENTLY BEFORE THE COURT, AND THE ASSERTED CONSEQUENCES OF NOT GRANTING CERTIORARI ARE SPECULATIVE AND OVERSTATED.

A. The Issue Raised By The PUC Is Not Ripe For Determination, In That The Matter Was Remanded For Further Proceedings And The Asserted Consequences Are Merely Hypothetical.

The procedural posture of this case makes it inappropriate for review by this Court. After vacating the Public Utility Commission's Order dated March 31, 1995, the Commonwealth Court remanded the case to the PUC to apportion costs for the planning, repair and maintenance of the 41st Street Bridge between Conrail, the City of Philadelphia ("the City") and the Pennsylvania Department of Transportation ("PennDOT"), who are presently before this Court, and Amtrak, which is not. The Commonwealth Court retained jurisdiction until the cost apportionment was accomplished. 676 A.2d at 1309 (Pet. App. at 24a-25a). Furthermore, the order of the Pennsylvania Supreme Court denying the PUC's petition for allowance of appeal was "without prejudice," indicating that that court saw the matter as not yet ripe for review. (Pet. App. at 2a).

Generally, this Court will await final judgment in the lower courts before exercising its certiorari jurisdiction, irrespective of whether the case meets the criteria of Supreme Court Rule 10. In *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), this Court denied a petition for a writ of certiorari where the Fourth Circuit had remanded the case to the district court for further proceedings. *See United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992), *cert. denied*, 508 U.S. 946 (1993).

That case involved significant constitutional issues under the 14th Amendment, with a fully developed factual record. 976 F.2d at 892. The remand occurred solely to address the appropriate remedy. 976 F.2d at 900. In commenting upon the Court's denial of a writ of certiorari, Justice Scalia repeated the principle that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." 508 U.S. at 946 (Scalia, J., concurring).

In contrast to *Virginia Military Institute*, no important constitutional issue is present in this case that should warrant the Court's immediate attention. The crux of the present case involves a *potential* allocation of costs to Amtrak, which *might* occur upon remand. Because Amtrak did not participate in the cost allocation proceedings before the Commission, a further hearing may be necessary to develop a factual record to support any cost allocation which might be made to Amtrak. As such, the issues in this case simply "are not yet ripe for review." [1] *See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*).

As the Court held long ago in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916):

> [Certiorari] is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of deci-

[1] In addition, Conrail has filed suit against the PUC in the Special Court of the Regional Rail Reorganization Act at Docket No. 96-03, asking that Court, *inter alia*, to enjoin the PUC from ordering Conrail to perform any repairs, construction or maintenance of the 41st Street Bridge which occurred prior to April 1, 1976 (the statutory date of Conrail's creation). Pending the resolution of whether Conrail can be held liable for the share of any predecessor railroad's ownership responsibility for the bridge, there is also some uncertainty regarding the extent of the PUC's power to allocate costs for the repair of the 41st Street Bridge to Conrail.

> sion. *And except in extraordinary cases, the writ is not issued until final decree.* The decree that was sought to be reviewed by certiorari at complainant's instance *was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application.*

Id. at 258 (emphasis added) (citations omitted). Here, the PUC has not presented an "extraordinary case" that would merit the exercise of jurisdiction at this time, and, as such, its request for review is premature and should await a final order in the case.

Moreover, the dire consequences asserted by the PUC should this Court deny certiorari are vastly overstated. (Pet. at 7). The PUC cites no evidence, statute or case law in support of its contention that the Commonwealth Court would hold the PUC in contempt if it fails to make a cost allocation against Amtrak upon remand. If a cost allocation should be made against Amtrak on remand, Amtrak might file suit in the federal courts to enjoin enforcement of the allocation. Without a final order on the cost allocation by the PUC, however, its assertions are mere speculation. *See Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990) ("conjectural" or "hypothetical" harm does not fulfill Article III case or controversy requirement).

Furthermore, the Commonwealth Court's retention of jurisdiction pending an allocation of costs by the PUC makes it apparent that the Commonwealth Court itself intends to determine the allocation of ultimate costs. Not only is that a readily available interpretation of the order, but, that order, when read with the opinion of the court and against the decisions of the United States District Court for the Eastern District of Pennsylvania, in *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission,* 665 F.Supp 402 (E.D. Pa. 1987), *aff'd,* 848 F.2d 436 (3d Cir. 1988), *cert. denied,*

488 U.S. 893 (1988) (*Amtrak I*), and *National Railroad Passenger Corp. v. Commonwealth of Pennsylvania and Township of Tredyffrin*, 1991 U.S. Dist. LEXIS 92 (E.D. Pa. No. 86-5357, filed January 2, 1991), seems intended to insulate the PUC from any potential consequences of violation of the injunctive order in *Amtrak I*, retaining those burdens for itself.

This case provides no foundation for a grant of certiorari based upon an interlocutory decision and a hypothetical injury asserted by Petitioner.

B. No Conflict Exists Between The Parties, In That The Petition Asks The Court To Determine The Proper Characterization Of Rail-Highway Crossing Cost Allocations Against Amtrak And SEPTA Where Those Entities Are Not Parties Before This Court.

Petitioner requests that the Court determine whether 49 U.S.C. § 24301(*l*), which exempts Amtrak from "a tax or fee imposed by a State," serves to exempt Amtrak from rail-highway crossing cost allocations by Petitioner, a State agency. (Pet. at i). However, Amtrak, the entity against which costs *might* be imposed, is not a party before this Court.

As related in the decision from which Petitioner seeks review, the administrative law judge in the first instance held that the PUC had no authority to order Amtrak to repair and maintain the 41st Street Bridge, citing *Amtrak I, supra* (Pet. App. at 35a), wherein the Third Circuit held that the PUC could not impose on Amtrak costs of reconstructing a bridge crossing, because such imposition was equivalent to a tax and Amtrak was statutorily exempt from all state taxes and fees. Following the PUC order entered March 31, 1995, allocating costs for the repair and maintenance of the 41st Street Bridge to Conrail and the City, Amtrak did not seek to intervene as a party in the cross-appeals brought before the Penn-

sylvania Commonwealth Court,[2] whose decision Petitioner ultimately asks this Court to review. 676 A.2d at 1301 (Pet. App. at 5a). Thus, Amtrak is not a party to this proceeding, pursuant to Supreme Court Rule 12.6.

Petitioner further requests the Court to determine whether federal law exempts SEPTA from rail-highway crossing cost allocations under 49 U.S.C. § 24501(g), which extends to SEPTA the same exemption from a state tax or fee as is provided to Amtrak. SEPTA did not participate below and is not a party before this Court, nor is there a potential that any costs would be allocated to SEPTA upon remand. 676 A.2d at 1300 n.1 (Pet. App. at 4a n.1).

Article III of the United States Constitution limits the power of federal courts to deciding "cases" and "controversies." *Diamond v. Charles*, 476 U.S. 54, 61 (1986). In order to meet this requirement, the parties to the action must have adverse, personal stakes in the matter. *Asarco Inc. v. Kadish*, 490 U.S. 605, 619 (1989).

A personal stake in the outcome of the controversy "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Thus, the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). It is not to be placed in the hands of "concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

---

[2] Automatic status as parties in Commonwealth Court petition for review proceedings is limited to the petitioner and respondent, *i.e.*, the PUC, the City and Conrail. All other parties to the proceeding before the governmental unit below must file a notice of intervention in order to acquire status as parties before the Commonwealth Court, as did PennDOT but not Amtrak. *See* Pennsylvania Rule of Appellate Procedure 1531 and Note and Explanatory Note—1979 thereto (Appendix A at 1a).

The present case presents neither the necessary adversity between the parties nor a direct stake in the controversy by Petitioner to warrant a grant of certiorari by this Court. In spite of the PUC's conjectural protests that the decisions of the Third Circuit and Commonwealth Court constrain it from fulfilling its duty to protect the public safety at rail-highway crossings, the PUC has no direct stake in the outcome of this case.

It is Amtrak and SEPTA, which are not before this Court as parties, which ultimately will be required to pay, or be exempt from paying, any crossing repair and maintenance costs which may be allocated by the PUC. Instead of having a direct stake in the outcome, the PUC in reality is asking this Court to render an advisory opinion as to which court determination to follow, that of the Third Circuit or the Pennsylvania Commonwealth Court. *See Asarco Inc. v. Kadish, supra,* 490 U.S. at 619 (rendering of an advisory opinion does not fulfill "case or controversy" requirement).

Nor is there present before this Court the necessary adversity between the parties. The PUC has no direct interest in litigating Amtrak's position that it should be exempt from crossing repair and maintenance allocations, and in fact suggests that Amtrak should not be exempt. (Pet. at 8-11). Nor, certainly, does Conrail or the City have an interest in defending Amtrak's interests. Arguably, all parties before this Court could be on the same side regarding the issue. Thus, the adversity between parties necessary for this Court to grant certiorari is not present.

Upon remand, however, Amtrak would have an interest in participating in any subsequent proceedings before the PUC. If the PUC allocates any repair and maintenance costs to Amtrak, it could then appeal the PUC's decision to the Commonwealth Court. SEPTA could also intervene

in such an appeal under Pennsylvania Rule of Appellate Procedure 1531. (Appendix A at 1a).

The requirement that the parties have adverse interests and a direct stake in the outcome before this Court can only be fulfilled if the PUC allocates crossing repair and maintenance costs to Amtrak upon remand. Therefore, the Court should deny the PUC's petition for a writ of certiorari at this time, when the entities which have the largest personal stake in the matter are not before the Court, and no adversity exists between the present parties. *See generally Renne v. Geary,* 501 U.S. 312, 320 (1991) ("Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention.")

II. THE DECISIONS OF THE THIRD AND SECOND CIRCUITS WHICH RELATE TO AMTRAK'S EXEMPTION ARE BASED ON DIFFERENT SUBJECT MATTER AND PRESENT NO CONFLICT.

The PUC attempts to find a conflict between the decisions of the Third and Second Circuits regarding the extent of Amtrak's exemption in an effort to convince this Court to grant certiorari. (Pet. at 10-11). Neither decision is before this Court, but the decisions of the two Circuits are clearly distinguishable, as was recognized by the Second Circuit in its later decision in *National Railroad Passenger Corp. v. City of New York,* 882 F.2d 710 (2d Cir. 1989) (*Amtrak II*) (Pet. App. at 45a).

In setting up this alleged conflict, the PUC fails to consider that the Second Circuit itself found no conflict between its decision in *Amtrak II* and the earlier Third Circuit decision in *Amtrak I, supra,* 848 F.2d 436. (Pet. App. at 35a). In finding that no conflict existed, the Second Circuit succinctly stated:

> [B]ecause this case involves consensual payments made in exchange for the use of real property by

> Amtrak, we have no occasion to consider whether the Third Circuit's reasoning in *National Railroad Passenger Corp.*, 848 F.2d 436, would lead to a different result. In that case, the court concluded that a nonconsensual assessment on Amtrak intended to partially fund construction of a bridge was an assessment for a local improvement from which Amtrak was exempt. In contrast, the circumstances presented to us so clearly concern an area not within the parameters of section 546b [now 49 U.S.C. § 24301(*l*)] that it is unnecessary to consider the federal tax immunity rules considered by the Third Circuit.

National Railroad Passenger Corp. v. City of New York, 882 F.2d at 716 n.2. (Pet. App. at 56a n.2).

The Second Circuit found a clear distinction between the payments at issue in the two cases, in that the contractual rental payments in *Amtrak II* were *consensual*, whereas the bridge improvement assessments imposed in *Amtrak I* were *nonconsensual*. *Id.* Because the two cases were decided under clearly distinguishable criteria, there is no conflict between the decisions of the Second and Third Circuits regarding the extent of Amtrak's exemption under 49 U.S.C. § 24301(*l*). There is thus no reason for the Court to grant certiorari on this asserted basis.

III. THE CHARACTERIZATION OF PUC ASSESSMENTS AS TAXES UNDER A DIFFERENT STATUTE IN A SEPARATE CASE, WHICH IS AWAITING REVIEW BY THE THIRD CIRCUIT, IS NOT PROPERLY BEFORE THIS COURT AND THUS IS NOT RIPE FOR CONSIDERATION.

The PUC contends that the Third Circuit decisions regarding the characterization of crossing cost allocations assessed by the PUC as "taxes" under 49 U.S.C. § 24301(*l*) is being used to the detriment of the PUC's statutory authority to regulate rail-highway crossings in

other cases, specifically citing *Wheeling & Lake Erie Railway Co. v. Pa. Public Utility Commission, et al.*, Civil Action No. 94-1776 (W.D. Pa. 1996). (Pet. at 12-14). The PUC argues that the District Court's decision in that case was "based" on the Third Circuit decisions regarding Amtrak and SEPTA and "stat[es] that since the PUC assessments in rail-highway crossing cases are 'taxes' which are not levied against other commercial and industrial tax payers or common carriers, then they are discriminatory taxes" in violation of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501.

However, a close reading of the District Court's decision in the *Wheeling & Lake Erie Railway Co.* case shows that it is not "based" on the Third Circuit decisions regarding crossing cost allocations against Amtrak and SEPTA. Rather, it is based primarily on Section 306 jurisprudence regarding discriminatory taxation. (Pet. App. at 61a-68a).

Nor is the *Wheeling & Lake Erie Railway Co.* case ripe for consideration by this Court. As stated by the PUC, the District Court's decision in the matter has been appealed to the Third Circuit Court of Appeals, Docket Nos. 96-3703 and 96-3704, which has not yet addressed whether a crossing cost allocation by the PUC constitutes a discriminatory tax for purposes of 49 U.S.C. § 11501. Until such time as the Third Circuit renders its judgment in the *Wheeling & Lake Erie Railway Co.* case, it would not be proper for this Court to grant certiorari as to whether the Third Circuit's characterization of Amtrak's tax exemption under 49 U.S.C. § 24301(*l*) is controlling under the wholly separate provisions of 49 U.S.C. § 11501 contained in the Railroad Revitalization and Regulatory Reform Act of 1976. *Aaron v. Cooper*, 357 U.S. 566 (1958).

Furthermore, the issue of whether crossing cost allocations constitute a discriminatory tax under 49 U.S.C.

§ 11501 has not been presented to this Court and is not an issue in this case. The only issue which has been presented to this Court is whether a crossing cost allocation to Amtrak constitutes a "tax or fee" within the meaning of 49 U.S.C. § 24301(*l*). (Pet. App. at i). If and when the issue of crossing cost allocations under 49 U.S.C. § 11501 reaches this Court, that will be in a controversy involving different issues and different parties from those presently before the Court, and provides a further reason why certiorari should not be granted on this basis. *See Burke v. Barnes,* 479 U.S. 361, 364 (1987).

The PUC's argument on this point merely represents an effort to bring an extraneous matter into this case to make it appear more significant. Because the characterization of crossing cost allocations as a discriminatory "tax or fee" under Section 306 of the Railroad Revitalization and Regulatory Reform Act is not properly before this Court, and has yet to be reviewed by the Third Circuit Court of Appeals, certiorari should not be granted on this basis.

IV. THE GRANTING OF CERTIORARI WOULD NOT BE A PROPER EXERCISE OF THE COURT'S DISCRETION, IN THAT THIS CASE PRESENTS A PURELY LOCAL ISSUE WITH NO NATIONAL RAMIFICATIONS.

The PUC asserts that the Pennsylvania and Third Circuit holdings regarding Amtrak's statutory exemption from state and local taxation have "far-reaching ramifications." (Pet. at 11). However, the PUC refers only to Amtrak and SEPTA crossings in Pennsylvania as being affected by the decisions. (Pet. at 12). The PUC cites no evidence nor does case law provide any indication that these state and federal decisions affect any state other than Pennsylvania.

By the PUC's own implicit admission, this case is merely a local issue with no national ramifications. Therefore, the granting of certiorari by the Court in this matter

would not be a proper exercise of its discretion. *See Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 180 (1988) (effect of state court decision on regulation of federally owned nuclear production facilities in other states important factor in determining Court's jurisdiction).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BENJAMIN C. DUNLAP, JR.
DAVID C. EATON
Counsel of Record
NAUMAN, SMITH, SHISSLER
& HALL
200 North Third Street
P.O. Box 840
Harrisburg, PA 17108
(717) 236-3010

JOHN F. FANSMITH
Associate General Counsel
Taxes and Securities
SCOTT K. WASSERKRUG
Associate General Counsel
CONSOLIDATED RAIL CORPORATION
Two Commerce Square
2001 Market Street
Floor 16-A
Philadelphia, PA 19101
Counsel for Respondent
Consolidated Rail Corporation

APPENDIX

APPENDIX

APPENDIX A

Pennsylvania Rules of Appellate Procedure

RULE 1531. INTERVENTION

(a) Notice of Intervention. A party to a proceeding before a government unit which resulted in a quasijudicial order may intervene as of right in a proceeding under this chapter relating to such order by filing a notice of intervention (with proof of service on all parties to the matter) with the prothonotary of the appellate court within 30 days after notice of the filing of the petition for review. In the case of a person for whom an appearance has been entered pursuant to Rule 1514(d) (entry of appearance) the failure to file a timely notice of intervention under this rule shall operate to strike off the appearance of such person in the appellate court. The notice of intervention may be in substantially the following form:

NOTICE OF INTERVENTION

Notice is hereby given that A.B., a party below, hereby intervenes in this matter.

(s) _____

_____

(Address and telephone number)

(b) Application for Intervention. A person not named as a respondent in the petition for review, who desires to intervene in a proceeding under this chapter, and who is not entitled to file a notice of intervention under Subdivision (a) of this rule, may seek leave to intervene by filing an application for leave to intervene (with proof of service on all parties to the matter) with the prothonotary of the court within 30 days after the filing of the petition for review. The application shall contain a concise state-

ment of the interest of the applicant and the grounds upon which intervention is sought.

Note

A nonparty may file a brief as of right under Rule 531 (participation by amicus curiae) and therefore intervention is not necessary in order to participate in the appellate court where the petition for review is filed. However, except as provided in Rule 521(b) (status of Attorney General) and Rule 522(b) (status of Court Administrator), the mere filing of a brief does not confer party status. Where, for example, a nonparty to a petition for review proceeding in the Commonwealth Court desires to be in a position to seek review in the Supreme Court of Pennsylvania or the Supreme Court of the United States of the order of the Commonwealth Court disposing of the petition for review, the nonparty should intervene or seek leave to intervene in the Commonwealth Court at the outset, since under Rule 501 (any aggrieved party may appeal) party status is a prerequisite to the right to further review.

Amended May 16, 1979, effective 120 days after June 2, 1979.

Explanatory Note—1979

The automatic status as parties in an appellate court in petition for review proceedings is limited to the petitioner and respondent. Other parties below, even if represented by counsel named in the proof of service of the petition, lose their status as intervenors unless they file in the appellate court a timely notice of intervention, thereby eliminating the expense of serving paperbooks on parties below who have no actual interest in the issues on appeal.